

February 16, 2009

OPINION ON REHEARING - NOT FOR PUBLICATION

BROWN, Judge

David Drawbaugh and Cynthia Drawbaugh appealed the trial court's denial of their motion to correct error and / or their motion to set aside dismissal following the trial court's order dismissing their complaint for medical malpractice against The Methodist Hospital, Inc. (the "Hospital"), Dr. Paul Stanish, and Jim Atterholt. We affirmed the trial court's dismissal of the Drawbaughs' complaint. See Drawbaugh v. Methodist Hospital, Inc. & Dr. Paul Stanish, No. 45A05-0710-CV-579, slip op. at 35 (October 23, 2008).

The Drawbaughs raise two issues in their petition for rehearing, which we revise and restate as:

- I. Whether this court erred by concluding that the trial court did not abuse its discretion by finding that the Drawbaughs' failed to tender complete and responsive supplemental answers to Interrogatories 11 and 18; and
- II. Whether this court erred when it found that the trial court did not abuse its discretion when it denied the Drawbaughs' motion to correct error and / or their motion to set aside dismissal as to Dr. Stanish.

We grant rehearing and reaffirm our opinion regarding the Hospital. However, we vacate the portion of our memorandum decision addressing the Drawbaughs' complaint against Dr. Stanish and reverse the trial court's dismissal of the Drawbaughs' complaint against Dr. Stanish.

I.

The first issue is whether this court erred by concluding that the trial court did not abuse its discretion by finding that the Drawbaughs' failed to tender complete and responsive supplemental answers to Interrogatories 11 and 18. The Drawbaughs argue that the supplemental discovery responses to Interrogatories 11 and 18 were sufficient and that the trial court failed to make an independent review of the discovery responses. Petition at 4-10. This court already addressed the Drawbaughs arguments. See slip op. at 26-29.

II.

The next issue is whether this court erred when it found that the trial court did not abuse its discretion when it denied the Drawbaughs' motion to correct error and / or their motion to set aside dismissal as to Dr. Stanish. The Drawbaughs argue that we failed to consider the facts relative to the dismissal of Dr. Stanish separately from that of the Hospital and that it was an abuse of discretion to dismiss their complaint against Dr. Stanish solely on the basis that they failed to strike a member of the medical review panel by the trial court's deadline. Petition at 2.

As noted in our memorandum opinion, we review the trial court's decision for an abuse of discretion. See slip op. at 20, 24. We held that the trial court dismissed the Drawbaughs' complaint because the Drawbaughs: (1) did not tender complete and responsive supplemental answers to the Hospital's discovery; (2) demonstrated a contumacious pattern of behavior in regard to compliance with the trial court's discovery orders; and (3) did not complete their portion of the striking process for selection of the

medical review panel by June 22, 2007. Id. at 24. The Drawbaughs are correct that the first reason for the trial court's dismissal relates to the Hospital. In our memorandum opinion, we noted that prejudice may not have resulted from the Drawbaughs striking of a panel member on Sunday instead of Friday. See id. at 32. Further, after reviewing the record and arguments, we conclude that the Drawbaughs' actions and the reasons given by the trial court for dismissing the Drawbaughs' complaint relate mainly to the Hospital. Under the circumstances, we conclude that the trial court abused its discretion by dismissing the Drawbaughs' complaint against Dr. Stanish.

For the foregoing reasons, we grant rehearing, reaffirm our opinion regarding the Hospital, vacate the portion of our decision regarding Dr. Stanish, and reverse the trial court's dismissal of the Drawbaughs' complaint against Dr. Stanish.

Affirmed in part and reversed in part.

ROBB, J. and NAJAM, J. concur